BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSE ELLEN FERGUSON	)	
Claimant	)	
	)	
VS.	)	
	)	
HOLTON MANOR	)	
Respondent	)	Docket No. 1,013,363
	)	
AND	)	
	)	
KANSAS HEALTHCARE ASSOCIATION	)	
WC INS. TRUST	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 23, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict.

ISSUES

The ALJ granted claimant's request for temporary total disability benefits and medical treatment after concluding claimant established that she "met with personal injury by accident which arose out of and in the course of employment, and that notice was timely."[1]

The respondent requests review of this determination alleging the ALJ erred in two respects. First, respondent contends claimant failed to give timely notice as required by K.S.A. 44-520. Second, that claimant failed to establish an accidental injury that arose out of and in the course of her employment.

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[1] ALJ Order (Jan. 23, 2004) at 2.

Claimant argues the ALJ's conclusions are sufficiently supported by the evidence contained within the record and as such, the preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

Claimant began her employment with respondent in early June 2003. She was one of several people who performed general housekeeping and laundry services for respondent's nursing home. By the end of June or early July 2003, claimant testified that she was beginning to experience pain and numbness in her right hand. Claimant testified that she notified her immediate supervisor, Ron Kranz, "[p]robably around the week after the 4th of July, during that week" that she'd been having numbness and tinging in her wrist and palm making it difficult to do her laundry duties.[2] Mr. Kranz gave claimant a few days off and then she returned to her normal job duties, working the balance of July, August and September.

Claimant says she told Mr. Kranz on several other occasions about her hand problems and its connection to her work activities.[3] At no time, however, did claimant request medical treatment. Claimant sought treatment from her own physician and claimant says Mr. Kranz expressed a willingness to work with her on any limitations she might have.

On September 23, 2003, claimant woke up to find her right wrist swollen. She called in to work and advised she was not coming in and was going to see the doctor. After seeing her own physician and receiving work restrictions, claimant returned to work on her next regularly scheduled day, September 25. In response to the doctor's restrictions and claimant's complaints, Mr. Kranz took claimant off the schedule for 2 weeks and recommended she contact the respondent's Administrator to find out when she could return to work.

Claimant left the facility on the 25th before her shift was concluded. Claimant testified that she was experiencing pain and asked the Administrator, Colene Moser-Guitierrez, if she could leave early. It was during this exchange that Ms. Guitierrez contends claimant denied any work-related "incident". Claimant contends Ms. Guitierrez focused her questions on whether an "incident" had happened at work and because claimant could not identify a precise "incident" (rather than a series of microtraumas) Ms.

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[2] P.H. Trans. at 13-14.

[3] *Id.* at 18.

Guitierrez assumed there was no connection to claimant's work activities.[4] This testimony is somewhat inconsistent with Ms. Guitierrez' testimony at the preliminary hearing.

Claimant applied for unemployment since she wasn't working and on September 30, 2003, again contacted Colene Moser-Guitierrez, the Administrator, about returning to work. By this time, respondent had received claimant's claim for unemployment. The two women met and claimant was advised that she had been terminated for excessive absences. Ms. Guitierrez provided deposition testimony indicating that during this meeting, she first learned of the claimant's hand complaints and their relation to her work activities.

After hearing this evidence, the ALJ concluded claimant had established the necessary elements of her claim, thereby entitling her to benefits. Specifically, he found that there was some confusion on the issue of notice, stemming from claimant's failure to clearly assert a claim of a work accident as well as the respondent's apparent failure to recognize a repetitive use type of accident. He went on to state that "[w]hile this may support a finding of actual notice on the part of the [r]espondent, "the notice given by the [c]laimant during the conversation about her firing [on October 2, 2003] was given within ten days."[5]

K.S.A. 44-520 requires that notice of an accident be provided to the respondent within 10 days of the date of accident. This notice is to state the time, place and particulars of the accident and indicate the name and address of the person injured. The 10-day notice shall not bar recovery if the claimant shows that failure to provide notice within this 10 days was due to just cause. Just cause will allow the notice to respondent to extend to 75 days from the date of accident unless actual knowledge of the accident by the employer or the employer's duly authorized agent renders giving notice unnecessary. The purpose of notice is to afford an employer an opportunity to investigate an accident and to furnish prompt medical treatment.[6]

The ALJ found that claimant gave notice of her series of accidents at least on October 2, 2003. That date is within 10 days of her last date of work, September 25, 2003, which is, under our present case law, considered the date of accident.[7] The Board affirms the ALJ's finding with respect to notice.

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[4] Claimant's Brief (filed Mar. 1, 2004) at 3.

[5] ALJ Order (Jan. 23, 2004) at 2.

[6] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[7] See e.g., *Treaster v. Dillons Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

Likewise, the Board affirms the ALJ's conclusion that claimant sustained personal injury by accident arising out of and in the course of her employment. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

In *Kindel*, the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501, *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

Here, claimant testified her repetitive work activities caused pain in her right hand and wrist. There is no suggestion within the record that claimant's job is not repetitive or that she misrepresented the nature of her job duties. Uncontradicted evidence which is not improbable or unreasonable can not be disregarded unless shown to be untrustworthy.[11] The Board finds no reason to disturb the ALJ's finding on this issue.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[12]

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[8] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

[9] *Springston v. IML Freight, Inc.*, 10 Kan. App .2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[11] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146(1976).

[12] K.S.A. 44-534a(a)(2).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated January 23, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2004.

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BOARD MEMBER

c: Roger Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director